



# NEWSLETTER

October 2022

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# OVERSEAS INVESTMENT

## DIRECTION, RULES & REGULATIONS

### Introduction

In keeping with the spirit of liberalisation and to promote ease of doing business, significant step has been taken with operationalisation of a new Overseas Investment regime which was notified on 22th August 2022

Foreign Exchange Management (Overseas Investment) Directions, 2022

Foreign Exchange Management (Overseas Investment) Rules, 2022 - Notified by the Central Government

Foreign Exchange Management (Overseas Investment) Regulations, 2022 - Notified by the Reserve Bank

In supersession of

- ✓ Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004 and
- ✓ Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015

### OI Rules v/s OI Regulations

#### OI Rules

- Provides regulatory framework
- Covering the permissions, conditions for making overseas investment, restrictions from making Overseas Direct Investment ('ODI'), pricing guidelines, transfer, liquidation and restructuring of ODI.
- Framed by CG administered by the RBI.

#### OI Regulations

- Provides only the operational part
- Covering conditions for undertaking Financial Commitment ('FC'), other than by investment in equity capital, consideration in case of acquisition or transfer of equity capital of a Foreign Entity ('FE'), mode of payment, obligations of Persons Resident in India ('PRII'), reporting requirements, consequence of delay in reporting and restrictions on further FC/ transfer.

### Non-Applicability of rules and regulations in certain cases

Nothing shall apply to-

- Investment outside India by a financial institution in an IFSC;
- Acquisition or transfer of any investment outside India made, -
  - ✓ out of Resident Foreign Currency Account; or
  - ✓ out of foreign currency resources held outside India by a person who is employed in India for a specific duration/specific job or assignment, duration of which does not exceed three years;

## Components of Overseas Investment

- Under the erstwhile ODI regulations, effective till August 21, 2022, there was a concept of direct investment outside India in JV and WOS that excluded portfolio investment and FC.
- OI Rules combines the two to define FC and separately define the term Overseas Portfolio Investment ('OPI').

### Overseas Investment ('OI') is FC + OPI.

- The classification as ODI depends on the
  - ✓ nature of instruments in which investment is made,
  - ✓ the nature of the entity in which investment is made and
  - ✓ whether control has been acquired or not.

## Overseas Direct Investment (ODI)

- Means
  - ✓ acquisition of any unlisted equity capital or subscription as a part of the Memorandum of Association of a foreign entity, or
  - ✓ investment in 10% or more of the paid-up equity capital of a listed foreign entity, or
  - ✓ investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity.
- Once an investment in a foreign entity is classified as ODI, the investment shall continue to be treated as ODI even if such investment falls below 10% of the paid-up equity capital or the investor loses control in the foreign entity.

"control" means the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle them to ten percent or more of voting rights or in any other manner in the entity

## Permitted Activities

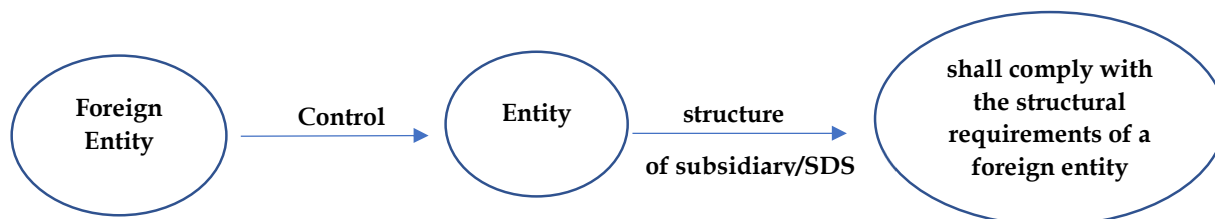
- Investment by PRII shall be in foreign entity engaged in bona fide business activity
- Directly, through step down subsidiary or the special-purpose vehicle

## Concept of JV/WOS substituted by 'foreign entity'

<p>Erstwhile permitted Indian parties to extend loan or a guarantee to or on behalf of the Joint Venture ("JV")/Wholly Owned Subsidiary ("WOS") abroad</p>	<p>Under the ODI Guidelines: The concept of a JV/WOS under the ODI has been substituted with the concept of a 'foreign entity'</p>	<p>An entity formed or registered or incorporated outside India, including in the International Financial Service Centre ("IFSC") in India, that has limited liability*.</p>
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- Note that the requirement of limited liability for the foreign entity does not apply
  - ✓ to a foreign entity with core activity in a strategic sector (i.e., sectors including energy and natural resources sectors such as oil, gas, coal, mineral ores, submarine cable system) and
  - ✓ start-ups and
  - ✓ any other sector as deemed necessary by the Central Government.

### “Subsidiary”/ “step down subsidiary (SDS)” of a foreign entity



- *Requirements of foreign entity* - such subsidiary/SDS shall also have limited liability where the foreign entity’s core activity is not in strategic sector.
- The investee entities of the foreign entity where such foreign entity does not have control (as defined above) shall not be treated as SDSs and therefore need not be reported henceforth.

### Approval from the Reserve Bank

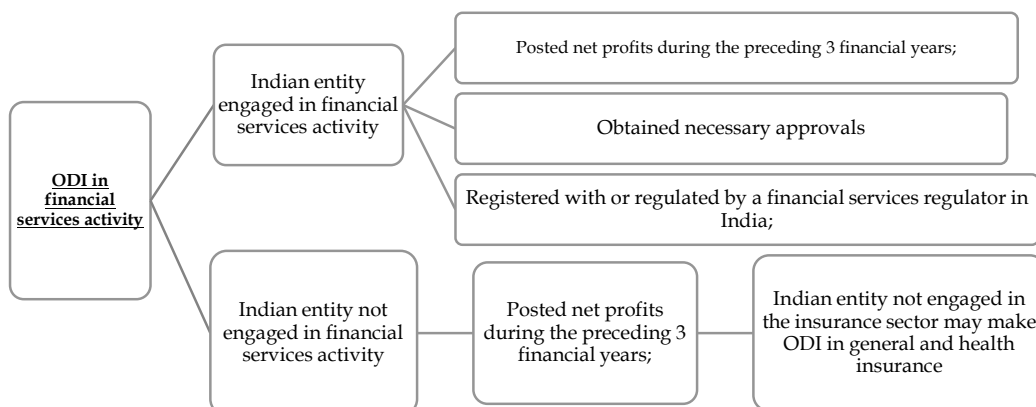
- Financial commitment by an Indian entity, exceeding USD 1 (one) billion (or its equivalent) in a financial year shall require prior approval of the Reserve Bank even when the total financial commitment of the Indian entity is within the eligible limit under the automatic route.

### Manner of making Overseas Direct Investment by Indian entity – Schedule I

#### Manner of making ODI

ODI may be made or held by way of,-

- subscription of MOA or purchase of equity capital
- acquisition through bidding or tender procedure;
- acquisition by way of rights issue or bonus shares;
- capitalisation for realisation of any amount (within time)
- swap of securities;
- merger, demerger, amalgamation or any scheme of arrangement



**Limit for financial commitment :** Total FC shall not exceed 400% of its net worth. Shall not include capitalisation of retained earnings but shall include-

- ADR, GDR and stock-swap of such receipts; and
- ECB to the extent the corresponding pledge or creation of charge on assets to raise such borrowings has not already been reckoned towards the above limit:

**No limit of FC by Maharatna or Navratna or Miniratna or subsidiaries of such public sector undertakings in foreign entities engaged in strategic sectors**

### Rights issue and bonus shares

Any PRII who has acquired and continues to hold equity capital of any foreign entity-

- a) may invest in the equity capital issued by such entity as a rights issue; or
- b) may be granted bonus shares subject to the terms and conditions under these rules.

Renunciation of such rights is also allowed

### Pricing guidelines

- Issue or transfer of equity capital of a foreign entity -shall be made **at arm's length** basis which shall be verified by AD Bank as per any internationally accepted pricing methodology
- The AD bank shall put in place a board approved policy within two months from the date of these directions.

### Restrictions and prohibitions for OI

- A PRII shall not make OI in foreign entity engaged in
  - real estate,
  - gambling in any form or
  - dealing with financial products linked to Indian Rupee without specific approval of RBI.
- Indian entities can use only internal accruals while investing in Start-ups of host Countries whereas the resident individuals can use their own funds.
- Further no OI in foreign entities that have invested in India, in more than two layers of subsidiaries.
  - Such restriction not applicable on banking company, NBFCs, insurance and Govt company

### Restrictions and prohibitions for OI

- Only with General or Special permission of RBI
- Except for certain properties as -
  - ✓ held by a PRII who is a national of a foreign State;
  - ✓ acquired on or before the 8th day of July, 1947;
  - ✓ acquired on a lease not exceeding five years.
- PRII may acquire Immovable property from non-resident
  - ✓ by way of Inheritance
  - ✓ Jointly with a relative who has a PROI Income or
  - ✓ sale proceeds of assets, other than ODI acquired overseas Purchase of foreign exchange or
  - ✓ Purchase out of remittances sent under Liberalised Incentive Scheme of RBI
- Indian entity having an office overseas may acquire an immovable property for business or residential purpose as per directions of RBI. Provided total remittances do not exceed the following limits as for initial and recurring expenses respectively:

- ✓ 15% of the average annual sales/income or turnover of the Indian entity during the last two financial years or up to 25% of the net worth, whichever is higher;
- ✓ 10% of the average annual sales/income or turnover during the last two financial years.
- Further a PRII who has acquired an immovable property outside India can
  - ✓ transfer such property to PRII eligible under these rules or
  - ✓ can create charge on such property as per the directions of RBI.

### Financial commitment by Indian entity by modes other than equity capital

Under the new ODI Guidelines, an Indian entity may lend or invest in

- **any debt instrument** issued by a foreign entity (The investment in debt instruments issued by the foreign entity will require a loan agreement and rate of interest on an arm's length basis) or
- **extend non-fund-based commitment** to or on behalf of a foreign entity (including its overseas step-down subsidiaries)
- where it (i) is eligible to make ODI (ii) has made ODI in the foreign entity, and (iii) has acquired 'control' in such foreign entity.

### Financial commitment by way of guarantee

- (i) corporate or performance guarantee by such Indian entity;
- (ii) corporate or performance guarantee by a group company of such Indian entity in India,
  - being a holding company (which holds at least 51 per cent. stake in the Indian entity) or
  - a subsidiary company (in which the Indian entity holds at least 51 per cent. stake) or
  - a promoter group company, which is a body corporate;
- (iii) personal guarantee by the resident individual promoter of such an Indian entity;
- (iv) bank guarantee, which is backed by a counter-guarantee or collateral by the Indian entity or its group company as above, and issued, by a bank in India.
- Guarantee is extended by a group company - counted towards the utilisation of its financial commitment limit independently and in case of a resident individual promoter, the same shall be counted towards the financial commitment limit of the Indian entity;
- commitment extended by a group company, any fund-based exposure to or from the Indian entity shall be deducted from the net worth of such group company for computing its financial commitment limit;
- guarantee extended by a promoter, which is a body corporate or an individual, the IE shall be a part of the promoter group.
- No guarantee shall be open-ended.
- The guarantee, to the extent of the amount invoked, shall cease to be a part of the non-fund-based commitment but be considered as lending.
- Guarantee extended jointly and severally by two or more Indian entities, 100%. amount shall be reckoned towards the individual limits of each of Indian entities.
- In case of performance guarantee, 50% of the amount of guarantee reckoned towards the FC Limit.

- Roll-over of guarantee - not be treated as fresh financial commitment if such roll-over does not exceed the amount of original guarantee.

### Financial commitment by way of pledge or charge

The ODI Regulations, now permits

- a pledge over the equity capital of the foreign entity in which the Indian Party has made ODI or its step-down subsidiary (“SDS”) outside India,
- a charge over assets of the foreign entity in which ODI has been made (or of its SDS outside India) – in favour of AD banks and Public financial institutions
- in favour of a debenture trustee registered with SEBI for availing fund-based facilities for such Indian entity, which was not available under the earlier regime

#### Calculation of FC:

- Unlike under the erstwhile provisions where the financial commitment of the Indian security provider was calculated as equivalent to the loan amount granted to the offshore entity,
- now the amount of financial commitment will be calculated as the lower of (i) the value of the pledge or charge or (ii) the amount of the facility.
- (Note: This will not apply to cases where the facility has been availed by the Indian entity itself).

### Overseas Investment- by Resident Individual

- An Individual may make ODI by way of investment in equity capital or OPI, subject to the overall ceiling *under Liberalised Incentive Scheme*.
- Currently, the LRS allows an individual USD 2, 50,000 outward investment per year.
- A Resident individual can now receive a gift or acquire foreign securities by way of inheritance from any non-resident outside India.

Earlier this was allowed *only from relatives*. This acquisition shall be subject to compliance of Foreign Contribution (Regulation) Act, 2010.

### Overseas Investment- by person resident in India other than Indian entity and resident Individual

- **Mutual Funds (MFs) and Venture Capital Funds (VCFs)/Alternative Investment Funds (AIFs)** registered with SEBI may, invest overseas in securities as within an overall cap of USD 7 billion and USD 1.5 billion, respectively.
- Further, a limited number of qualified MFs are permitted to invest cumulatively up to USD 1 billion in overseas Exchange Traded Funds, as may be permitted by SEBI. Such investment shall be considered as OPI irrespective of whether the securities are listed or not.
- MFs/VCFs/AIFs desirous of availing this facility may approach SEBI for necessary permission.
- General permission is available to such investors for sale of securities so acquired.
- An **AD bank**, including its overseas branch, may acquire or transfer foreign securities in the normal course of its banking business. The OI provisions shall not apply to such transaction.
- A **bank in India**, may acquire the shares of Society for Worldwide Interbank Financial Telecommunication (SWIFT) if permitted by the Reserve Bank.

- OI by **sole proprietorship or unregistered partnership firms** - within their limit available under the LRS. If the proposed investment is in strategic sector, any application for making overseas investment in excess of the LRS limit may be made under the government approval route.
- Overseas investment by **registered trust/society** may be made under the approval route in accordance with paragraph 1 of schedule IV of OI Rules.

### Overseas Investment in IFSC by person resident in India

- A person resident in India, being an **Indian entity or a resident individual**, may make investment (including sponsor contribution) in the units of an investment fund or vehicle set up in an IFSC as OPI.
- Accordingly, in addition to listed Indian companies and resident individuals, **unlisted Indian entities** may also make such investment in IFSC.
- The restriction of making ODI only in an operating foreign entity or not making ODI in a foreign entity engaged in financial services activity by resident individuals, shall not apply to an investment made in IFSC.
- Such investment, however, shall not be made in any foreign entity engaged in banking or insurance.
- Such foreign entity in IFSC may have subsidiary/SDS in IFSC. It may also have subsidiary/SDS outside IFSC where the resident individual does not have control in the foreign entity.

### Overseas Portfolio Investment (OPI)

- OPI - investment in foreign securities that is not ODI
- Excludes - Investment in any unlisted debt instruments or any security issued by PRII who is not in an IFSC.
- The classification is relevant as
  - ✓ Schedule I and II to the ODI Rules provides for the manner in which ODI and OPI can be made by an Indian Entity.
  - ✓ The limits of FC for OPI and ODI are different.
- Limits for investment by resident individual - limit under the Liberalized Remittance Scheme
- Limit for investment by mutual funds, venture funds etc are similar to erstwhile regime.
- A listed IE is eligible to make OPI within the aforesaid limit, while an unlisted IE is eligible to make OPI only towards rights issue or bonus issue by FE, capitalization of any amount due, swap of securities and schemes of arrangement.

### Manner of making Overseas Portfolio Investment by an Indian entity

- OPI by an Indian entity.-
- Limit for OPI - shall not exceed 50% of its net worth as on the date of its last audited balance sheet.
- A **listed** Indian company may make OPI including by way of reinvestment.
- An **unlisted** Indian entity may make OPI only by
  - ✓ acquisition by way of rights issue or bonus shares;



- ✓ capitalisation for realisation of any amount (within time)
- ✓ swap of securities;
- ✓ merger, demerger, amalgamation or any scheme of arrangement

### Mode of payment

A person resident in India making Overseas Investment may make payment -

- by remittance made through banking channels;
- from funds held in an account maintained in accordance with the provisions of the Act;
- by swap of securities;
- by using the proceeds of American Depository Receipts or Global Depository Receipts or stock-swap of such receipts or external commercial borrowings raised in accordance with the provisions of the Act and the rules and regulations made thereunder for making ODI or financial commitment by way of debt by an Indian entity.

(i) OI by way of cash is not permitted.

(ii) IE can make remittances to its overseas office/branch only for the purpose of normal business operations

(iii) A PRII shall not make any payment on behalf of any foreign entity other than by way of financial commitment.

(iv) Any investment/financial commitment in Nepal and Bhutan shall be done in a manner as prescribed

All dues receivable on investments (or financial commitment) made in freely convertible currencies, as well as their sale/winding up proceeds are required to be repatriated to India in freely convertible currencies only.

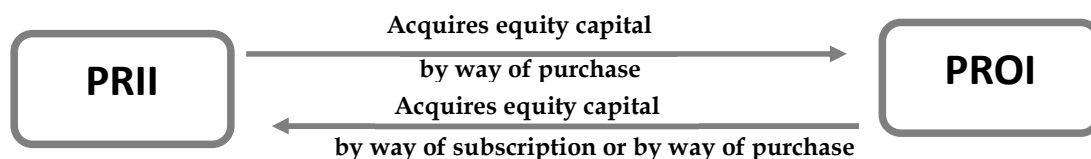
### Transfer or liquidation

- Transfer equity capital by way of sale
  - ✓ to a person resident in India, who is eligible to make such investment, or
  - ✓ to a person resident outside India.
- Transfer on account of merger, amalgamation or demerger or buyback of foreign securities, liquidation of the foreign entity - take approval of the competent authority as per the applicable laws in India or of the host country or
- Transfer on account of disinvestment
  - ✓ Ensure no outstanding dues to be received from foreign entity
  - ✓ must have stayed invested for at least one year from the date of making ODI

### Restructuring of Balance sheet of Foreign Entity

- If PRII invested in foreign entity may permit restructuring of balance sheets of such foreign entity which has incurred losses for preceding 2 years.
- Report from Registered valuer is required if there is diminution (Reduction in size) of entity whose
  - original investment is more than Rs 10 million or
  - amount of such diminution exceeds 20% of the total value of the outstanding dues

### Acquisition or transfer by way of deferred payment



- where such equity capital is reckoned as ODI,
- Can defer the payment for the equity capital acquired for such definite period as per in the agreement subject to the following: -
  - ✓ Seller shall Transfer/issue foreign securities equivalent to the total consideration to the buyer;
  - ✓ Consideration shall be as per the pricing guidelines:
- Deferred part shall be treated as non-fund-based commitment.
- The buyer may be indemnified by the seller up to such amount and be subject to such terms and conditions as may be mutually agreed upon and laid down in the agreement:
- The agreement shall be in compliance with the provisions of the Act and the rules and regulations.

### Obligations of person resident in India

submit share certificates or any other relevant documents to the AD bank as evidence of OI

within 6 months from the date

- of effecting remittance  
- on which the dues are capitalised or allowed to be capitalised

Before sending outward remittance or acquisition of equity capital in a foreign entity - obtain a FE's Unique Identification Number from the RBI

designate an AD bank and route all transactions relating to a particular UIN through such AD

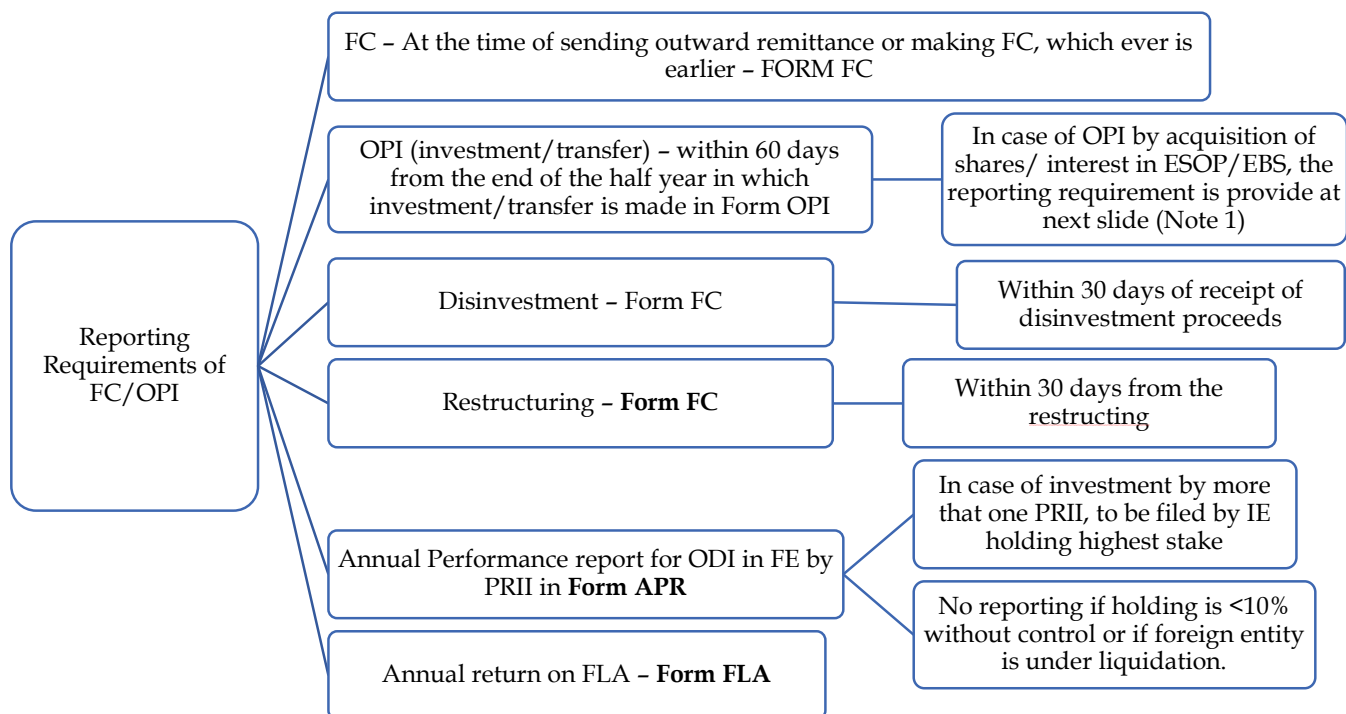
Realise and repatriate to India,

- all dues receivable with respect to investment from the foreign entity,
- amount of consideration received on account of transfer or disinvestment and
- net realisable value of the assets on account of the liquidation of the foreign entity,

within 90 days from the date when such receivables fall due or the date of such transfer or disinvestment or the date of the actual distribution of assets made by the official liquidator

Make remittance towards earnest money deposit or obtain a bid bond guarantee from an AD bank for participation in bidding or tender procedure.

## Reporting Requirements



- **Note 1:** In case of OPI by way of acquisition of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme, the reporting is required to be done by the office in India or branch of an overseas entity or a subsidiary in India of an overseas entity or the Indian entity in which the overseas entity has direct or indirect equity holding, where the resident individual is an employee or director.
- Further, as per the OI Directions, similar to the requirement under the erstwhile regime, evidence of investment that classify as ODI is required to be submitted within a period of six months to the AD Bank.

## Delay in reporting

- If PRII does not submit the evidence of investment or does not make any filing within the time specified,
- may make such submission or filing with **Late Submission Fee**
- within such period, and at the such rates and in the manner as may be directed by the Reserve Bank
- Provided that such facility can be availed within a maximum period of 3 years from the due date of such submission or filing.

**Cannot make any further financial commitment towards such foreign entity or transfer such investment till any delay in reporting is regularised.**

# MONTHLY UPDATES

## ✓ CHANGE IN DEFINITION OF SMALL COMPANY - NOTIFIED ON 15-09-2022

Small company mean a company, other than a public company which has: – Paid up share capital of not more than 4 Crore rupees and Turnover of which as per its last profit and loss account does not exceed 40 crores rupees.

## ✓ CSR AMENDMENT RULES, 2022 – NOTIFIED ON 20-09-2022

The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022 was introduced on September 20, 2022 (“Amendment Rules”), by the Ministry of Corporate Affairs. The following changes have been brought about by the Amendment Rules:

### 1. Establishment of a CSR committee for unspent CSR amount:

Companies are required to establish a CSR committee to monitor the execution of their CSR commitments and in particular any funds in their “Unspent Corporate Social Responsibility Account”. Companies may keep unused funds set aside for CSR in this designated Unspent CSR account as long as they use them within three financial years. Its utilisation is now to be monitored by the CSR committee.

### 2. Change in Expenditure for Impact Assessment

The cost of social impact assessments, which can be considered as CSR spending, cannot be greater than 2% of all CSR expenditures for the applicable financial year or Rupees 50 lakh, whichever is higher.

### 3. Revised format for annual report on CSR activities

The Amendment Rules provide for a new format for the annual report on CSR activities

# Compliance Calendar

Companies Act, 2013			
Compliance details	Form	Applicability	Due Date
Return for outstanding payments due to MSME as per the provisions of MSME Development Act, 2006	Form MSME 1 (Half Yearly)	Specified Companies which get supplies of goods or services from MSME, and whose payments exceed 45 days from the date of acceptance of the goods or services	31/10/2022
Filing financial statement and other documents with the Registrar	Form AOC-4/ AOC-4 CFS (XBRL & Non-XBRL)	Every Company	30-10-2022 /30 days from the date of AGM
KYC of Directors	Filing of DIR-3 KYC or DIR-3 KYC WEB	Every Director holding Director Identification number	15-10-2022
Form for filing Report on AGM	Form MGT-15	Every Listed Public Company	30-10-2022 /30 days from the date of AGM
Filing of Cost Audit Report	Form CRA-4	Every Company to which Cost Audit is applicable	30 days from the date of receipt of Cost Audit Report.
FEMA			
Compliance details	Form	Applicability	Due Date
External Commercial Borrowings (ECB) - FEMA	Form ECB-2	All Companies having ECB	07/10/2022
SEBI LODR Regulations			
Compliance details	Form	Applicability	Due Date
Regulation 13(3)	Statement of Investor complaints.	All Listed Entity	21/10/2022
Regulation 27 (2)	Corporate Governance	All Listed Entity, other than (a) the listed entity having equity paid up capital upto Rs. 10.00 Cr & net worth upto Rs. 25.00 Cr, as on the last date of the previous FY (b) the listed entity listed on the SME Exchange.	21/10/2022
Regulation 31(1) (b)	Shareholding Pattern.	All Listed Entity	21/10/2022
Labour Laws			
Compliance details	Form	Applicability	Due Date
Deposit of Provident Fund Contributions	Monthly ECR	Entities registered with PF Authorities	15/10/2022
Deposit of E.S.I.C Contributions	Monthly ECR	Entities registered with ESIC Authorities	15/10/2022
Rule 14(3): Contracts of Apprenticeship Training by the establishment shall be forwarded to Regional Director or State Apprenticeship Advisor	Form App-4	For the apprentices engaged	31/10/2022
Rule 14(10): Employer to maintain record and send report at the end of each quarter in Form Apprenticeship 6	Form APP-1		15/10/2022
Quarterly Return by employer having ten or more employees to the inspector	Form XXVII	Rule 33	10/10/2022

INCOME TAX			
Compliance details	Form	Applicability	Due Date
TDS Payment	Challan 281	Non-government deductors	07/10/2022
TDS returns	Form 24Q/26Q/27Q	All Tax deductors	31/10/2022
TCS returns		All Tax collectors	15/10/2022
Income tax return	Respective ITR's	assessee (not having any international or specified domestic transaction) is (a) corporate-assessee or (b) non-corporate assessee (whose books of account are required to be audited) or (c) partner of a firm whose accounts are required to be audited	31/10/2022
GST			
Compliance details	Form	Applicability	Due Date
Return of outward supplies of taxable goods and/or services	GSTR 1	GST Taxpayers who have not opted for QRMP scheme	11/10/2022
Return of outward supplies of taxable goods and/or services	GSTR 1	GST Taxpayers who opted for QRMP scheme -Optional	13/10/2022
Summary Return of Outward and Inward Supplies along with payment of Tax	GSTR 3B	GST Taxpayers who have not opted for QRMP scheme	20/10/2022
GST Challan Payment if no sufficient ITC		GST Taxpayers who opted for QRMP scheme and not having sufficient ITC	25/10/2022
Summary Return of Outward taxable supplies and tax payable	GSTR 5 & 5A	Non-Resident GST Taxpayers	20/10/2022
Return for details of ITC received and distribution	GSTR 6	Input Service Distributors	13/10/2022
Return for TDS under GST	GSTR 7	Government Authorities	10/10/2022
Return for Details of Supplies and the amount of tax collector	GSTR 8	E-commerce Operator	10/10/2022
Return for details of goods and services purchased in India	GSTR-11	Taxpayer claiming Refund & having UIN	28/10/2022
Summary Return of Outward and Inward Supplies along with payment of Tax	CMP-08	Composition taxpayers	18/10/2022